### B. The Commission's Policy Is Reasonable And Consistent With Agency Regulations.

Mountain argues that permitting LECs to charge paging carriers for transiting traffic defies "simple economic logic" and "contravenes cost-causation principles." Mountain Brief at 41, 42. According to Mountain, the costs associated with that traffic result from the "unilateral demands of the originating carrier," and should be recovered from that carrier. Mountain Brief, at 43.

Both Mountain and the originating LEC provide a communications service between the premises of the calling party and the pager of Mountain's subscriber. The originating LEC charges its subscribers for the ability to send messages to the pagers of Mountain's customers, and Mountain charges its subscribers for the ability to receive those messages.[68] The transiting traffic thus is an essential component of the end-to-end service that Mountain provides to its customers.

In contrast, transiting traffic is not part of any service that Qwest offers to its end-users. "[T]he only relationship between the [transiting] LEC's customers and the call is the fact that the call traverses the LEC's network on its way to the terminating carrier." Texcom Order, 16 FCC Rcd at 21495 (¶ 6). As between Qwest and Mountain, Mountain is the cost-causer, i.e., the carrier responsible for the transiting traffic. The Commission's determination that Qwest lawfully charged Mountain for the transport of transiting traffic thus is consistent with "cost-causation principles" and economic logic. The Commission recognizes that other legitimate

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[68] Petitions of Sprint and AT&T Corp., 17 FCC Rcd at 13199 (¶ 14). See CMRS Calling Party Pays Service Offering, 14 FCC Rcd 10861 (¶ 2) (1999) ("[T]he presubscribed customer of a CMRS provider – the 'called party' – generally pays all charges associated with incoming calls."). The Commission has stated that CMRS carriers do not strictly follow a calling party pays regime because those carriers "typically still charge their subscribers for incoming calls." Id. at 9624 n.54.

compensation schemes could be devised. The existence of other reasonable approaches, however, does not make the Commission's policy choice arbitrary and capricious.

Finally, Mountain argues cryptically that the Order "appears inconsistent" with unspecified "FCC intercarrier rules." Mountain Brief at 40. Mountain apparently contends the Commission's rules require a Calling Party Network Pays ("CPNP") approach for all types of carrier interconnection.[69] That contention is incorrect. Although CPNP is one approach to intercarrier compensation, it is not the only approach sanctioned by the Commission's regulations.[70] As the Commission has made clear, the intercarrier compensation rules "allow a LEC to charge a paging carrier for traffic that transits the LEC's network and terminates on the paging carrier's network as long as the traffic does not originate on the LEC's network." Texcom Order, 16 FCC Rcd at 21495 (¶ 5).

### C. The Intervenors' Argument That Qwest's Charges For Transiting Traffic Violate Section 51.709 Is Not Properly Before The Court And In Any Event Is Without Merit.

The paging carrier intervenors make a separate argument not raised by Mountain on review: that the Commission erred in not interpreting section 51.709(b) to bar Qwest from charging Mountain for the transport of transiting traffic. See 47 C.F.R. § 51.709(b). Paging Carriers Intervenors' Brief at 22-24. The Court should not permit the intervenors to raise an

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[69] Under a CPNP regime, the calling party's carrier compensates the called party's carrier for terminating the call. Intercarrier Compensation NPRM, 16 FCC Rcd at 9614 (¶ 9).

[70] See Intercarrier Compensation NPRM, 16 FCC Rcd at 9613 (¶ 5). Recognizing that its "complex system of intercarrier compensation regulations . . . treat[s] different types of carriers and different types of services disparately," the Commission instituted a proceeding to revise its rules to establish a "unified approach to intercarrier compensation." 16 FCC Rcd at 9612, 9613 (¶¶ 2, 5)

issue that the petitioner did not raise. If the Court entertains the argument, however, it should find no inconsistency between the Order and section 51.709(b).

The Supreme Court has observed that "one of the most usual procedural rules is that an intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues." Vinson v. Washington Gas Co., 321 U.S. 489, 498 (1944). In the absence of an "extraordinary case[]"[71] of the sort not presented here, the Court will refuse to permit intervenors to argue issues not presented by the principal parties.[72] Although Mountain argued before the Commission that Qwest's charges for transiting traffic violated section 51.709(b), Mountain has chosen not to pursue that issue on review.[73] Mountain's opening brief does not even mention section 51.709(b), let alone argue that the Commission

[71] National Association of Regulatory Utility Commissioners v. ICC, 41 F.3d 721, 730 (D.C. Cir. 1994).

[72] E.g., Louisiana Public Service Commission v. FERC, 174 F.3d 218, 224 n.5 (D.C. Cir. 1999); SBC Communications v. FCC, 56 F.3d 1484, 1489-90 (D.C. Cir. 1995). Illinois Bell Telephone Co. v. FCC, 911 F.2d 776, 786 (D.C. Cir. 1990).

[73] Mountain may not resurrect the section 51.709(b) issue by presenting it in its reply brief. The Court will not consider an argument raised by a party on review for the first time in a reply brief. See, e.g., Kimberlin v. Department of Justice, 318 F.3d 228, 232 n.2 (D.C. Cir. 2003); Benkelman Telephone Co. v. FCC, 220 F.3d 601, 607 n.10 (D.C. Cir. 2000).

misconstrued that rule. The Court should not permit the intervenors to expand the scope of this review proceeding.[74]

In any event, the Commission reasonably interpreted section 51.709(b) not to prohibit Qwest from charging Mountain for the transport of transiting traffic. Both the language of the rule and administrative precedent support that construction.

Section 51.709(b) provides that "the rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network."[75] Transiting traffic, however, always involves the transport of traffic among at least three carriers' networks: the originating carrier, the transiting carrier(s) and the terminating carrier. The text of section 51.709(b) thus does not address transiting traffic.

The intervenors contend that section 51.709(b) "on its face" precludes Qwest from charging for traffic it delivers "to Mountain from a third carrier." Paging Carrier Intervenors' Brief at 23. Under well-established law, however, a statute or regulation "must, if possible, be

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[74] The intervenors in seeking leave to file a separate brief told the Court that "it appears that the particular interconnect architecture utilized by Mountain and Qwest is substantially different from that used by most" intervenors. "Joint Submission By Petitioner and Petitioner-Intervenors Regarding Proposed Briefing Format," (Dec. 19, 2002) at 3. The intervenors stated that a separate brief would enable them to argue that "the principles announced in the Mountain Orders should not be applied to their own interconnection situations." Id. at 4. In their separate brief, however, the intervenors assert that "Mountain's interconnection arrangement with Qwest is similar to arrangements between many wireless carriers and incumbent LECs." Paging Carriers Intervenors' Brief at 5. See also id. at 17 ("[T]he Mountain/Qwest arrangement is no different from that which exists whenever a CMRS carrier establishes a single interconnection point serving multiple local calling areas."). The intervenors have not justified their attempt to enlarge the issues on review.

[75] 47 C.F.R. § 51.709(b) (emphasis added).

construed in such fashion that every word has some operative effect."[76] The intervenor's construction ignores the limiting phrase "between two carriers' networks" in section 51.709(b), in violation of that principle of statutory and regulatory construction.

Moreover, the Commission's construction comports with administrative precedent. The Commission in Texcom held that section 51.709(b) "governs the division of the cost of dedicated transition facilities between two carriers," and thus "does not apply in the transiting traffic context, where the traffic . . . originates instead with a third carrier." Texcom, 16 FCC Rcd at 21496 (¶ 8). The Commission in this case followed Texcom in rejecting the interpretation of section 51.709(b) advanced by the intervenors in this case. See also Qwest Corp. v. FCC, 252 F.3d at 468.

## III. MOUNTAIN'S CLAIM THAT THE COMMISSION ERRED BY FAILING TO EXPLAIN HOW A TERMINATING CARRIER MAY BE REIMBURSED FOR TRANSITING COSTS IS NOT PROPERLY BEFORE THE COURT AND IN ANY EVENT HAS NO MERIT.

The Commission in footnote 13 of the Order observed that "a terminating carrier may seek reimbursement of [transiting] costs from originating carriers through reciprocal compensation." Order, 17 FCC Rcd at 15137 n.13 (J.A. ). Mountain argues that the Commission committed reversible error because it did not explain in this adjudication how such reimbursement would occur. Mountain also contends that footnote 13 is unworkable. For three independent reasons, the Court lacks jurisdiction to consider these arguments.

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[76] Dole Food Co. v. Patrickso, 123 S.Ct 1655, 1661 (2003), quoting United States v. Nordic Village, Inc, 503 U.S. 30, 36 (1992).

First, Mountain did not bring to the Commission's attention any of the arguments about footnote 13 that it presents in its brief. Section 405 thus bars the Court from considering these arguments on review. See United States Cellular Corp. v. FCC, 254 F.3d at 83.

Second, Mountain lacks standing to challenge footnote 13. To establish standing, a litigant must establish that it suffers an actual or imminent injury that is fairly traceable to the challenged agency action and is likely to be redressed by a favorable decision. See, e.g., Vermont Agency of Natural Resources v. United States, 529 U.S. 765, 771 (2000). The Commission's general observation that terminating carriers may seek reimbursement of transiting traffic costs from originating carriers through reciprocal compensation does not even arguably subject Mountain to any actual or imminent harm.

Third, the Commission's non-decisional observation that terminating carriers "may seek" reimbursement of transiting costs from originating carriers is not within the Court's jurisdiction to review the agency's action. As the Supreme Court repeatedly has recognized, courts review "judgments, not statements in opinions."[77] The task of a federal appellate court thus is not to review an agency's observations in isolation, but rather to determine whether an alleged legal error "resulted in an erroneous judgment." Chevron USA Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842, reh. denied, 468 U.S. 1227 (1984). In FCC v. Pacifica Foundation, 438 U.S. 726, reh. denied, 439 U.S. 883 (1978), for example, the Supreme Court held that "general statements" in Commission adjudications that "do not change the character of its order" are unreviewable. 438 U.S. at 734.

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[77] E.g., Johnson v. DeGrandy, 512 U.S. 997, 1003 n.5 (1994); California v. Rooney, 483 U.S. 307, 311, reh. denied, 483 U.S. 1056 (1987).

Congress codified this well-established restraint on the judicial reviewing power by authorizing the courts of appeals to review only Commission "orders." 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a). As this Court has held, the statutory term "order" operates as a limitation on the Court's subject-matter jurisdiction by denying review of non-decisional statements in Commission opinions. See American Telephone & Telegraph Co. v. FCC, 602 F.2d 401, 407 (D.C. Cir. 1979).

The Commission's statement in footnote 13 that terminating carriers "may seek" reimbursement of transiting traffic charges from originating carriers is not a part of the judgment reviewable by this Court. The Order adjudicated a complaint filed by Mountain against a single carrier, Qwest, alleging that Qwest unlawfully had assessed charges for the delivery of transiting traffic. The Order did not adjudicate Mountain's entitlement vel non to the reimbursement of transiting traffic charges from originating carriers. Indeed, Mountain in its complaint did not ask for such reimbursement. The Order did not adjudicate issues not raised in the complaint or determine the liability of parties not before it.

If the Court nonetheless reaches the issue, it should reject Mountain's claim that the Commission had a duty to explain how its reciprocal compensation rules would operate to permit a terminating carrier to seek reimbursement of transiting charges.[78] Although the Commission is required to articulate a rational basis for its decision, there is no requirement that it provide an explanation for non-decisional observations or statements contained in an order.

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[78] Although Mountain complains that footnote 13 is unexplained and unworkable, it does not claim that the Commission was wrong in stating that "a terminating carrier may seek reimbursement of [transiting] costs from originating carriers." Order, 17 FCC Rcd at 15137 n.13 (J.A. ). Indeed, Mountain told the Court that there is "no issue over the originating carrier's ultimate responsibility to pay for all transit charges." Mountain Brief at 39 (emphasis omitted).

Equally unpersuasive is Mountain's assertion that the alleged "reimbursement scheme" mentioned in footnote 13 is "unworkable" because Qwest does not "send Mountain the information it needs to identify and bill the originating carrier." Mountain Brief at 45. The Commission in footnote 13 observed generally that terminating carriers "may seek" reimbursement from originating carriers; it did not decide that Mountain necessarily is entitled to such reimbursement. That is hardly surprising, since the record evidence shows that Mountain had not paid Qwest's transiting traffic bills.[79] Mountain does not explain how it could obtain reimbursement for transiting traffic charges without paying those charges in the first instance. And, although Mountain complains that Qwest did not "send" it information on the identity of the originating carriers, Mountain does not claim that it asked Qwest for that information.[80]

[79] Answer at iii, 36 (J.A. ).

[80] There is no merit to Mountain's claim that the Commission's observation in footnote 13 conflicts with the staff's Virginia Arbitration Order, 17 FCC Rcd 27039. As shown in Section I.C., the Commission has no legal obligation to conform its judgments with staff decisions. A fortiorari *the Commission does not err merely because dicta in a footnote allegedly* "is inconsistent with the views of its . . . staff." Mountain Brief at 44.

## CONCLUSION

The Court should deny the petition for review.

Respectfully submitted,

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June 19, 2003

In the United States Court of Appeals for the
District of Columbia Circuit

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| MOUNTAIN COMMUNICATIONS, INC., | ) | |
| | ) | |
| PETITIONER, | ) | |
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| V. | ) | |
| | ) | |
| FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, | ) | NO. 02-1255 |
| | ) | |
| RESPONDENTS. | ) | |
| | ) | |
| | ) | |

**CERTIFICATE OF COMPLIANCE**

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 13509 words.

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June 19, 2003

## STATUTORY APPENDIX

47 USC § 208

47 USC § 405

47 C.F.R. § 51.703

47 C.F.R. § 51.709

# UNITED STATES CODE ANNOTATED
# TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
# CHAPTER 5--WIRE OR RADIO COMMUNICATION
# SUBCHAPTER II--COMMON CARRIERS
# PART I--COMMON CARRIER REGULATION



Current through P.L. 108-30, approved 05-29-03

## § 208. Complaints to Commission; investigations; duration of investigation; appeal of order concluding investigation

**(a)** Any person, any body politic, or municipal organization, or State commission, complaining of anything done or omitted to be done by any common carrier subject to this chapter, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been caused, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

**(b)(1)** Except as provided in paragraph (2), the Commission shall, with respect to any investigation under this section of the lawfulness of a charge, classification, regulation, or practice, issue an order concluding such investigation within 5 months after the date on which the complaint was filed.

**(2)** The Commission shall, with respect to any such investigation initiated prior to

November 3, 1988, issue an order concluding the investigation not later than 12 months after November 3, 1988.

**(3)** Any order concluding an investigation under paragraph (1) or (2) shall be a final order and may be appealed under section 402(a) of this title.

# UNITED STATES CODE ANNOTATED
# TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
# CHAPTER 5--WIRE OR RADIO COMMUNICATION
# SUBCHAPTER IV--PROCEDURAL AND ADMINISTRATIVE PROVISIONS



Current through P.L. 108-30, approved 05-29-03

## § 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order

**(a)** After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided,* That in any case where such

petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

**(b)(1)** Within 90 days after receiving a petition for reconsideration of an order concluding a hearing under section 204(a) of this title or concluding an investigation under section 208(b) of this title, the Commission shall issue an order granting or denying such petition.

**(2)** Any order issued under paragraph (1) shall be a final order and may be appealed under section 402(a) of this title.

# CODE OF FEDERAL REGULATIONS
# TITLE 47--TELECOMMUNICATION
# CHAPTER I--FEDERAL COMMUNICATIONS COMMISSION
# SUBCHAPTER B--COMMON CARRIER SERVICES
# PART 51--INTERCONNECTION
# SUBPART H--RECIPROCAL COMPENSATION FOR TRANSPORT AND TERMINATION OF TELECOMMUNICATIONS TRAFFIC

Current through June 2, 2003; 68 FR 32799

## § 51.703 Reciprocal compensation obligation of LECs.

(a) Each LEC shall establish reciprocal compensation arrangements for transport and termination of telecommunications traffic with any requesting telecommunications carrier.

(b) A LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network.

# CODE OF FEDERAL REGULATIONS
# TITLE 47--TELECOMMUNICATION
# CHAPTER I--FEDERAL COMMUNICATIONS COMMISSION
# SUBCHAPTER B--COMMON CARRIER SERVICES
# PART 51--INTERCONNECTION
# SUBPART H--RECIPROCAL COMPENSATION FOR TRANSPORT AND TERMINATION OF TELECOMMUNICATIONS TRAFFIC

Current through June 2, 2003; 68 FR 32799

## § 51.709 Rate structure for transport and termination.

(a) In state proceedings, a state commission shall establish rates for the transport and termination of telecommunications traffic that are structured consistently with the manner that carriers incur those costs, and consistently with the principles in § § 51.507 and 51.509.

(b) The rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network. Such proportions may be measured during peak periods.

**Mailed 5/15/03**

Decision 03-05-031 May 08, 2003

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

| | |
|---|---|
| In the Matter of Application of Pacific Bell Telephone Company (U-1001-C) for Arbitration with Pac-West Telecomm, Inc. (U5266-C) Pursuant to Section 252(b) of the Telecommunications Act of 1996. | Application 02-03-059 (Filed April 18, 2002) |

# DECISION APPROVING ARBITRATED AGREEMENT PURSUANT TO SECTION 252, SUBSECTION (e), OF THE TELECOMMUNICATIONS ACT OF 1996 (ACT)


## Summary

In this decision we modify and approve the arbitrated interconnection agreement (ICA) filed by Pacific Bell Telephone Company d/b/a SBC-California (SBC) and Pac-West Telecomm, Inc. (Pac-West), under Rule 4.2 of our Revised Rules Governing Filings made Pursuant to the Telecommunications Act of 1996 (Rules), pursuant to Subsection 252(e) of the Act. We find that the ICA does not violate the requirements of Section 251 of that Act, the Federal Communications Commission's (FCC) implementing regulations therefore, or the pricing standards set forth in Subsection 252(d) of the Act. However, we do find that the Final Arbitrator's Report finding on Issue 14 of the agreement is inconsistent with Commission policy established in prior interconnection agreement (ICA) cases, and therefore Issue 14 of the ICA shall be modified to comport with this decision and established Commission practice.

Application (A.) 02-03-059 is closed.

## Background and Procedural History

As required by Subsection 252(e)(1) of the Act, in this decision we approve with modification the proposed ICA between SBC and Pac-West, following arbitration of certain issues the parties could not resolve through negotiation. Pac-West's previous ICA with SBC expired on June 29, 2001.

The history of the dispute, and a complete discussion of the parties and disputed issues, are set forth in detail in the Final Arbitrator's Report (FAR), which was filed on November 19, 2002. Rule 4.2.1 required the parties to file the entire agreement conforming to the FAR, and respective statements concerning approval or rejection of the proposed ICA, within seven days after issuance of the FAR. Both parties timely complied with these filing requirements, thus placing before us the task of approving or rejecting the ICA in its current form.[1]

Rule 4.2.1 specifies that each party's statement must indicate:

a. the tests the Commission must use to measure an agreement for approval or rejection,
b. whether the party believes the agreement passes or fails each test, and
c. whether or not the agreement should be approved or rejected by the Commission.

SBC's comments state that under the Act an arbitrated ICA may be rejected by this Commission only if:

> The agreement does not meet the requirements of section 251 [thereof], including the regulations prescribed by the [Federal

[1] No comments were filed by any member of the public within ten days after the filing of the agreement, as permitted under Rule 4.2.1.

> Communications Commission]...or the standards set forth in [Section 252(d)].This test is mirrored by our Rule 4.2.3.[2]

Pac-West's comments do not state that there is any material flaw in the ICA, and Pac-West indicates that the Commission should approve the ICA in its current form. SBC's comments argue that the resolution of a single arbitrated issue, Issue 14, fails the test for Commission approval. SBC urges us to modify the outcome of this issue so that the ICA will comport with the requirements of the Act, and then adopt it. SBC argues that the ICA must be rejected if this change is not made.

## Discussion

### a. Disputed Issue

Issue number 14, as cast by the parties, asks whether SBC should be allowed to collect transport charges on calls destined to Pac-West customers with disparate rating and routing points. Consistent with the outcome in the GNAPs Arbitration, the Draft Arbitrator's Report found that SBC should receive transport charges from Pac-West for Virtual NXX (VNXX)[3] traffic pending FCC resolution of the issue in the *Intercarrier Compensation NPRM*. In their comments

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[2] Pac-West's comments state that a different standard applies to negotiated portions of an ICA than to arbitrated portions, but this approach is incorrect: Rule 4.3.1 specifies different and a much simpler process for Commission approval of a negotiated ICA, reflecting a clear distinction between a completely voluntary agreement and one that has been the subject of arbitration or mediation, in whole or in part. Simply put, insofar as arbitration is involved, an ICA is either virginal or it is not; there is no middle ground under our rules.

[3] VNXX is a form of Foreign Exchange service, where the purchaser of the VNXX is not physically located in the originating callers local calling area, yet the originating call to the VNXX is considered local from the caller's perspective. This differs from traditional local calling where the called NXX and callers NXX resides within the same local calling area.

Pac-West and O[1] criticized this result. In the FAR the Arbitrator reversed the outcome and adopted Pac-West's resolution of the issue, denying SBC compensation for VNXX traffic, subject to revision during the term of the ICA on the basis of changes occasioned by future decisions of the FCC or this Commission. SBC objects that this outcome is contrary to a previous Commission decision, Decision (D.) 99-09-029, and three Commission arbitration decisions based upon that rulemaking.

In its comments Pac-West defends the result reached in the FAR on this issue, principally because SBC cannot differentiate local from VNXX calls when they are handed off to Pac-West, and—more importantly—because SBC essentially incurs the same cost to originate calls of either type. The reason lays in the specific nature of the network interconnection design, which requires SBC to long-haul virtually all calls to Pac-West in order for Pac-West's switch in one of three locations to route the call over its system to its customer[4]. Consequently, claims Pac-West, the destination of calls originated by SBC is immaterial from the cost standpoint, and any differences are *de minimis*, because they represent only the cost differential between two alternative intra-LATA long-haul routings.

True, SBC cannot differentiate the traffic it hands off to Pac-West that is destined for the originating rate center (local NXX) from interexchange traffic destined 16 miles away from the originating rate center (VNXX). However, Pac-West clearly knows where it terminates the traffic it receives from SBC. It is irrelevant whether the traffic Pac-West terminates to its customer is a voice call, or is handed off to the Internet or a private network. The rate area associated

[4] FCC rules provide that carriers are allowed at least one point of interconnection within a local access transport area.

with where Pac-West delivers traffic to its customer is the relevant " termination point" for transport rating purposes.

Since Pac-West knows to where it terminates traffic for its customers, Pac-West is capable of identifying the amount of traffic that is returned to the originating rate center (local NXX), and the amount of traffic it terminates which is interexchange - more than 16 miles away from the originating rate center (VNXX). Indeed, the concept of an interconnecting carrier having to identify traffic for purposes of rating by the local carrier is already an industry practice. InterExchange Carriers (IECs) identify the amount of interstate and intrastate traffic that they receive or terminate, thereby identifying the applicable interstate or intrastate "special access" charges the local carrier will assess upon them. In the case before us, Pac-West can similarly identify to SBC the amount of traffic terminated within 16 miles of the originating rate center, and the amount terminated 16 miles away from the originating rate center.[5]

Second, we do not agree with Pac-West that the costs are *de minimis*. Clearly, uncompensated costs are borne by the originating network provider and Pac-West's claim that a cost differential for VNXX must be found is a red herring.[6] Regardless of whether the traffic's eventual destination is the originating local calling area or a VNXX destination, we would expect the transport cost between SBC and Pac-West to be the same. We overturn the result reached by the Arbitrator on this issue, because contrary to the FAR, there is no need for SBC to explain whether its cost of transporting traffic to Pac-West

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[5] The ICA includes auditing procedures and non-disclosure agreements necessary to protect confidential/proprietary information.

[6] SBC carries the traffic over its system after the hand-off; it does so under entirely separate compensation arrangements that are not in controversy.

will differ based on where Pac-West delivers it. The Commission in an arbitration decision between Level 3 and Pacific Bell (prior to SBC-California) already addressed this issue. Decision 01-02-045, states;

> "D.99-09-029 granted Level 3 the right to assign routing and rating points and provide Virtual NXX service, so long as Pacific is fairly compensated. Pacific showed that it has uncompensated costs when carrying calls for Level 3's Virtual NXX customers. Therefore, Level 3 must compensate Pacific for the use of Pacific's facilities regardless of whether or not Pacific incurs additional costs when transporting Level 3's Virtual NXX traffic.

Third, the FAR incorrectly places relevance in the argument of Pac-West that its situation is quite different from GNAPs which sought to establish LATA-wide "local" service via VNXX, because Pac-West provides various types of local services through disparate rating and routing, and that these services are offered using the traditional local calling areas of SBC for purposes of defining local and toll traffic. It is irrelevant how Pac-West's and GNAP's service offering differ. At issue is whether SBC should, or should not be compensated for the costs to deliver to Pac-West VNXX traffic, which by the nature of its termination outside of the originating calling area it is interexchange traffic, although it is rated as a local call to the calling party.[7] In this case, it is relevant that Pac-West and GNAPs similarly intends to offer VNXX services to its customers, and that each did not wish to pay for interexchange transport for VNXX traffic. Because Pac-West terminates some traffic within the originating local area, it does not have to pay for such transport from the ILEC to the Pac-West POI. The fact that GNAPs

[7] Pac-West argues that transport charges are paid by the originating call, telephone subscriber. This may be true to a very limited extent that local exchange costs include interexchange costs within the local calling area. However, transport costs outside the local calling area are excluded.

did not intend to offer a local NXX service, but only to offer "virtural local service" via VNXX is irrelevant.

The Commission in deciding prior arbitration agreements concluded that CLECs would be absolved from paying the costs associated with transport from origination to their point of interconnection on the condition that the disparately rated and routed traffic was returned and terminated within the rate area where the local call originated. For foreign exchange type of service, where the traffic does not return to the originating rate center, such traffic would be subject to transport charges.[8] These policies are clearly elucidated by the Commission in D. 02-06-076;

> The calling areas adopted by the Commission govern whether a call is local or an intraLATA toll call. Any call rated as an intraLATA toll call under the Commission's established calling areas would constitute exchange access traffic, not local traffic. (p.20)
>
> "(W) e have no intention of making a decision in an arbitration proceeding that would have the net result of abolishing intraLATA calling. For calls that are intaLATA in nature, e.g., those beyond 16 miles, traditional access charges will apply." (p.24)

Additionally, the Commission's local compensation rules require the originating call carrier to compensate the CLEC for terminating the "local" traffic, including VNXX traffic that is disparately rated and routed, as in a foreign exchange (FX) service.

Decision 02-06-076, page 28, states;

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[8] See GNAPs Arbitration Decision 02-06-076, pp. 25-30.

> "...VNXX calls would be intraLATA calls, not local calls, if tied to the rate center that serves the customer. By allowing disparate rating and routing, we are allowing for those calls to become local calls, and as such, subject to reciprocal compensation. However, GNAPs is required to pay the additional transport required to get those calls where they will be considered local calls. ...This is similar to the concept of the ILEC's tariffed FX service, in which the customer pays for the privilege of receiving dialtone from a different exchange. Because these calls would be intraLATA toll calls, if they were rated out of the rate center, which actually provides service to the customer, they are not subject to the provisions of Rule 703(b)."

The rationale supporting the premise of the ILEC not having to pay for transport for disparately rated and routed "local calls" was based on a quid pro quo that the CLEC bears the cost of returning the traffic from its point of interconnection to the local calling rate center.[9] This "quid pro quo" policy promotes local competition and improves the opportunity for CLECs to utilize one point of interconnection to serve each of the rate centers within the LATA. Thus, CLECs have to balance the investment cost of adding a point of interconnection with the cost of purchased transport, leased or otherwise, from their switching facilities to the end user.

The prior arbitration decisions reflect a consistent Commission application of the principle of cost causation. The principle would be violated if the Commission allowed competitors to avoid paying for transport over another carrier's network in order to long haul interexchange traffic terminated in

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[9] FCC Rule 51.703(b) forbids the ILECs from assessing any charges to transport "local" traffic, which is subject to reciprocal compensation provisions. However, Interexchange traffic is not subject to the Telecommunications Act's reciprocal compensation requirements. The California Commission determined that disparately routed, local calls and VNXX calls are subject to reciprocal compensation, not the FCC.